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IN THE

Supreme Court of the United States

MICHAEL J. BROWN,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in the absence of any evidence of a negative impact on the employee's job responsibilities, an employing agency may remove a federal civilian employee for lawful, off-duty conduct, not arising from the employee's job duties, based on the unsubstantiated claims of agency officials, reflecting their personal mores, that they have lost trust and confidence in the employee's performance?

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PETITION FOR A WRIT OF CERTIORARI

Michael J. Brown (Brown) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion and order of the court of appeals that is the subject of this petition may be found at *Brown v. Department of the Navy*, 229 F.3d 1356 (Fed. Cir. 2000), and is also set forth at Appendix (App.) 1a-25a. The unpublished order of the court of appeals denying Mr. Brown's combined petition for panel rehearing and for rehearing *en banc* is set forth at App. 26a. The final order of the Merit Systems Protection Board (MSPB) that was reviewed by the court of appeals may be found at *Brown v. Department of the Navy*, 83 M.S.P.R. 230 (1999). App. 27a-34a. The unpublished initial decision of the MSPB administrative judge that was reviewed by the MSPB is set forth at App. 35a-50a.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2000. App. 1a. A combined petition for panel rehearing and for panel rehearing *en banc* was denied on December 28, 2000. App. 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision directly involved in this case is 5 U.S.C. 7513(a), which states:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

Other statutory provisions with pertinence to this case are reproduced in the appendix beginning at page 51a.

STATEMENT OF THE CASE

A. The Factual Background

A number of years prior to petitioner Brown becoming a federal civilian employee, Mr. Brown was a Marine officer stationed at Quantico, Virginia. App. 29a, 37a. While stationed at Quantico, Mr. Brown and his wife became acquainted with Major B, another Marine officer, and his wife (hereinafter Mrs. B). App. 29a-30a, 37a. Shortly thereafter, Mr. Brown resigned from active duty with the Marine Corps, but remained an officer in the Marine Reserves. App. 30a, 37a-38a. Mr. Brown also became divorced from his wife. App. 38a.

By 1995, Mr. Brown had relocated to the Jacksonville, North Carolina area. App. 30a, 38a. In approximately April of 1995, Mr. Brown obtained *civilian* employment with the Marine Corps at Camp Lejeune. *Id.* Mr. Brown was employed as a GS-9 Program Manager with the Morale, Welfare and Recreation (MWR) Department. App. 29a, 35a. Mr. Brown's primary job responsibility as a Program Manager was to

coordinate special social events for military personnel and family members at Camp Lejeune. App. 2a, 16a-17a. This job involved administrative, planning and budgetary duties and very little contact with the spouses of Marines. App. 32a. Mr. Brown's Program Manager duties did not involve any counseling of Marines or their family members on personal or family problems. App. 16a.

Independently, Major B was stationed at Camp Lejeune and social contacts between Major and Mrs. B and Mr. Brown resumed. App. 30a, 38a. Between August, 1995, and February, 1996, Major B was deployed overseas with his Marine unit. App. 38a. It was found in the proceedings below that Mr. Brown, during the limited period of Major B's deployment, participated in a private, consensual and off-duty romantic affair with Mrs. B. App. 14a, 30a, 34a, 38a, 39a, 42a.

No evidence exists in the record to indicate that any romantic affair between Mr. Brown and Mrs. B resulted from any misuse by Mr. Brown of his civilian job with the Marines. App. 9a, 14a-15a, 32a-33a. There is no evidence either that any romantic affair between the two persons resulted for any reason other than a special affinity between the two persons, or that Mr. Brown is more predisposed to engage in a romantic affair in the future with the spouse of a Marine than any other person. Any affair involving Mr. Brown and Mrs. B also did not adversely affect Mr. Brown's job performance. App. 15a, 31a. Mr. Brown received an excellent performance appraisal for the period of time in which the affair purportedly occurred. *Id.*

In approximately January of 1997, nearly a year following the termination of the purported affair, Major B was informed of the purported affair between Mrs. B and Mr. Brown. App. 38a. Major B reported the affair to the Marine Corps so that action could be taken relative to Mr. Brown's status as an officer in the Marine Reserves. *Id.* However, in addition to actions taken against Mr. Brown in his status as a military officer, the Marine Corps also removed Mr. Brown from his civilian job position,

effective August 11, 1997, on a charge of "improper personal conduct" based on the purported romantic affair between Mr. Brown and Mrs. B. App. 1a, 29a, 36a.

B. The MSPB Proceedings

In accordance with 5 U.S.C. 7513(d) and 7701(a), Mr. Brown timely appealed the decision removing him from federal civilian employment to the Merit Systems Protection Board (MSPB). Soon thereafter, a hearing on Mr. Brown's civilian removal was held before an MSPB administrative judge. In this hearing, the employing agency offered the testimony of a number of persons in order to justify a finding of "nexus" between Mr. Brown's purported conduct and Mr. Brown's job responsibilities. Functionally, each person's testimony consisted of opinion as to how the conduct attributed to Mr. Brown affected the operations of the MWR Department. An MWR operations officer expressed the view that the incident attributed to Mr. Brown took credibility away from the MWR Department. App. 5a. A "key volunteer coordinator" (in this case, the spouse of a military commander serving as a contact person for the Program Manager in the planning of events) asserted in testimony that the conduct attributed to Mr. Brown put her program in a "less than favorable light." *Id.*

The Assistant Chief of Staff of the MWR Department at Camp Lejeune testified that the conduct attributed to Mr. Brown undercut the integrity of the organization and that it was likely that a Marine unit commander with knowledge of the purported conduct would request that Mr. Brown not provide service to his unit. App. 5a-6a. A family readiness officer for a Marine unit testified that it was important for deployed Marines to trust the MWR program managers. App. 6a. Finally, a commander of a Marine unit testified that, if military commanders bypassed the MWR Department, it would degrade the efficiency of the MWR operation. *Id.*

In an initial decision issued on January 2, 1998, the MSPB administrative judge (AJ) affirmed the employing agency's

action removing Mr. Brown from civilian employment. App. 35a-50a. After finding that a romantic affair between Mr. Brown and Mrs. B occurred (App. 37a-42a), the AJ then addressed the question of whether there is a sufficient "nexus" between the off-duty conduct attributed to Mr. Brown and the "efficiency of the service" as required by 5 U.S.C. 7513(a). App. 42a-48a. Citing the various grounds on which the MSPB has concluded that an employing federal agency may show a nexus between off-duty conduct and the "efficiency of the service" (App. 42a-43a), the AJ concluded that a nexus finding is appropriate based on evidence that the purported conduct "affected management's trust and confidence in his job performance," and on evidence that the purported conduct "interfered with and adversely affected the agency's mission." App. 43a. Finally, the AJ concluded that the selection of removal as a penalty by the employing agency was reasonable. App. 48a-50a.

Pursuant to MSPB regulations, Mr. Brown timely petitioned for review of the AJ's initial decision by the full MSPB. In an order of the MSPB dated August 10, 1999, a two member majority of the MSPB denied Mr. Brown's petition for review. App. 27a. The MSPB order indicated that the AJ's initial decision constitutes the final decision of the MSPB. *Id.*

MSPB Vice Chair Slavet issued a dissenting opinion on the MSPB's denial of Mr. Brown's petition for review. App. 29a-34a. In her dissent, Vice Chair Slavet first argued that the evidence on the alleged loss of agency trust and confidence in Mr. Brown's job performance is "both general and speculative." App. 32a. Vice Chair Slavet observed that Mr. Brown, in his civilian capacity, is not a Marine and is not subject to the Marine Corps' standards of behavior for military members. *Id.* Vice Chair Slavet further observed that there was no evidence that co-workers or Marine families were concerned with the purported conduct, that Mr. Brown's duties required little, if any, contact with the wives of deployed Marines, that Mr. Brown's conduct neither arose out of nor was related to his

duties, and that the conclusory statements of agency officials did not demonstrate that Mr. Brown could not carry out his responsibilities. App. 32a-33a. Vice Chair Slavet also argued in dissent that the employing agency failed to show that Mr. Brown's purported conduct was directly opposed to the agency's mission. App. 33a-34a. In this regard, Vice Chair Slavet observed that the theory that deployed Marines could worry about their marriages while they are deployed was speculative, particularly in light of the facts that the affair was long terminated, was private and consensual when it occurred, and did not arise out of Mr. Brown's employment. *Id.*

C. The Federal Circuit's Decision

Pursuant to 5 U.S.C. 7703(a) and (b)(1) and 28 U.S.C. 1295(a)(9), Mr. Brown filed a timely petition for review of the MSPB's final decision and order with the United States Court of Appeals for the Federal Circuit. In a decision dated October 20, 2000, a panel of the Federal Circuit, by a 2-1 vote, affirmed the MSPB's decision. App. 1a-25a. After describing the record below, the Federal Circuit majority held that "substantial evidence supports the [AJ's] finding of a nexus between Mr. Brown's misconduct and both the mission of the agency in general and his job responsibilities in particular." App. 7a. In justifying this conclusion, the Federal Circuit majority asserted that "the *trust and confidence* of the Marine families and the Marine commanders served by MWR was essential to MWR's proper functioning and to Mr. Brown's performance of his duties within MWR" and that "the necessary *trust and confidence* was undermined by conduct of the sort at issue in this case." *Id.* (emphasis added). The Federal Circuit majority also rejected a claim that the standards applied to military officers should not be the basis for standards applied to Mr. Brown's civilian employment. App. 11a. Finally, the Federal Circuit majority also upheld the employing agency's decision to choose removal from civilian employment as a penalty for Mr. Brown's purported misconduct. App. 12a-13a.

Circuit Judge Linn dissented from the panel majority's opinion. App. 14a-25a. In his dissent, Judge Linn opined that the panel majority "has stretched the nexus requirement so thin that [Mr.] Brown has become subject to the moral judgments of the employer" and that personnel decisions on such a basis are "an improper role for the government." App. 14a. Addressing the factual context of this case, Judge Linn opined that the panel majority gave inadequate weight to the fact that Mr. Brown knew Mrs. B before Mr. Brown began his civilian employment and to the fact that any relationship between the two had no causal connection with Mr. Brown's civilian employment. App. 14a-15a. On the MSPB rationale that a nexus could be found between the purported conduct and Mr. Brown's job responsibilities based on a loss of "trust and confidence" by agency management, Judge Linn noted that "all of the evidence adduced at the [MSPB] hearing was conjectural, speculative or unrelated to Mr. Brown's job responsibilities." App. 16a. Judge Linn observed that the majority's opinion could be read "as sanctioning the removal of an employee simply because of a difference in values between that employee and his superiors," and that "[i]f this evidence was enough to warrant removal, then no employee is safe from the threat of removal." App. 18a. Judge Linn similarly found that evidence of a nexus based on a "mission impairment" was lacking and could not be justified in the absence of evidence of a connection between the purported conduct of Mr. Brown and his job performance. App. 21a.

Following the panel decision, Mr. Brown timely filed a combined petition for panel rehearing and for rehearing *en banc* with the Federal Circuit. By order dated December 28, 2000, the Federal Circuit denied the combined petition. App. 26a.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to resolve an important question of federal law that has not been, but should be, settled by this Court. Specifically, this case presents the question of whether, in the absence of any evidence of a negative impact on

the job responsibilities of a federal civilian employee, an employing agency may remove the employee for lawful, off-duty conduct based on claims of a purported loss of trust or confidence that reflects the mores of agency officials. In addition, this Court should grant this petition because the Federal Circuit's application of the nexus requirement conflicts with the standards established by other federal appellate courts for the application of the nexus requirement.

A. The Decision of the Court Below Allows A Federal Civilian Employee To Be Removed For Lawful Off-Duty Conduct Unrelated to the Employee's Job Responsibilities Solely On Claims Of A Loss Of Trust Or Confidence Reflecting The Mores of Agency Officials

1. The Question At Issue Is Important

This case presents an important question of federal law. Mr. Brown's removal was based on an off-duty romantic relationship which arose independently of Mr. Brown's job duties. Yet a panel majority of the Federal Circuit concluded that a nexus between the off-duty affair and Mr. Brown's job responsibilities has been established. Thus, at issue in this case is the scope of the "nexus" requirement in federal employee disciplinary cases.

Under 5 U.S.C. 7513(a) (Section 7513), an employing federal agency may take a removal action against an agency employee "*only* for such cause as will promote the *efficiency of the service*" (emphasis added). Because the agency's authority to impose discipline is tied to the "efficiency of the service," any discipline for an employee's off-duty activities must be based on a connection between the off-duty activities and the "efficiency of the service." This connection is known in federal employment law as a "nexus."

The nexus requirement serves as an important restriction on the federal employer involving itself in the private lives of its

employees. Through use of the term "only," Section 7513 expressly limits the disciplinary power of an employing federal agency to those instances in which discipline is for such cause as will promote the efficiency of the service. In other words, the authority of agencies to take disciplinary actions "is at least confined to the things which are Caesar's." *Norton v. Macy*, 417 F.2d 1161, 1165 (D.C.Cir. 1969). The nexus requirement thus "serves to minimize unjustified governmental intrusions into the private activities of federal employees." *Doe v. Hampton*, 566 F.2d 265, 272 n. 20 (D.C.Cir. 1977). The purpose of the nexus requirement is therefore clear. As stated by the D.C. Circuit, "the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy and diversity." *Norton*, *supra*, 417 F.2d at 1165.

Because an employee's off-duty activities will normally not implicate job considerations, "[t]he nexus requirement is particularly strict in cases involving non-work related misconduct." *Gloster v. General Services Administration*, 720 F.2d 700, 703 (D.C.Cir. 1983). The Federal Circuit itself, at least prior to the present case, has implicitly noted this limitation of the nexus requirement on agency discipline of employees. Thus, the Federal Circuit has consistently described the nexus requirement as compelling an agency showing of a connection between the employee's off-duty misconduct and the employee's "job-related responsibilities." *E.g., Allred v. Department of Health and Human Services*, 786 F.2d 1128, 1130 (Fed. Cir. 1986); *Brook v. Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993); *see also* 5 U.S.C. 2302(b)(10) (making it a "prohibited personnel practice" for an agency to "discriminate . . . against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others").

Generally, those cases in which a nexus has been found between off-duty misconduct and an employee's job-related

responsibilities involve serious (and usually, if not always, criminal) conduct which clearly brings the effectiveness of the employee's future job performance into question. *E.g., Brook, supra* (removal of technician responsible for entire electrical system at NASA's Goddard Space Flight Center based on off-duty conviction of cocaine possession with intent to distribute); *Allred, supra*, 786 F.2d at 1131 (removal of employee responsible for monitoring programs for the benefit of children based on off-duty conviction for child molestation); *Masino v. United States*, 589 F.2d 1048, 1056 (Ct.Cl. 1978) (removal of Customs official responsible for excluding illegal drugs from the United States based on off-duty marijuana use); *Giles v. United States*, 553 F.2d 647, 650 (Ct.Cl. 1977) (removal of Internal Revenue Service agent responsible for the collection of delinquent tax payments and filings for failure to file personal tax returns in a timely manner). It is *not* petitioner's position that an employee's off-duty activities are always beyond the scope of the federal employer's disciplinary considerations. However, the cases just cited involve such a close correlation between the subject off-duty activities and the employee's job-related responsibilities that the federal employer's right to discipline for those activities cannot be meaningfully disputed.

By contrast, the Federal Circuit's decision in the present case displays such an expansive view of the activities which can fall within the nexus requirement that, if the rationale of the present decision is logically extended, the nexus requirement will be effectively nullified. Any affair between Mr. Brown and Mrs. B arose from contacts that predated Mr. Brown's civilian employment and Mr. Brown never used his civilian position to facilitate any affair with Mrs. B. Yet as will be explained *infra*, the panel majority of the Federal Circuit upheld a finding of nexus essentially because Mr. Brown's Marine superiors, who personally believed the off-duty conduct attributed to Mr. Brown to be objectionable, baldly claimed a loss of "trust and confidence."

There is no evidence of record that the conduct attributed to Mr. Brown prevented Mr. Brown from fulfilling his job responsibilities as MWR Program Manager. Nor is there any evidence of record that either the integrity of Mr. Brown's efforts as a Program Manager can be impugned, or that Marines and/or their family members (outside of the authority persons who testified for the agency before the MSPB) would be reluctant to attend any of the events coordinated by Mr. Brown because of the alleged affair. Allowing the federal employer to remove an employee for off-duty conduct because of claims of lost trust or confidence, colored by the distaste experienced by agency officials in response to that off-duty conduct, is tantamount to eliminating the nexus requirement in its entirety. After all, no employee is ever removed for disciplinary reasons in the absence of displeasure by the employee's superiors in regard to the subject conduct.

To the contrary, Section 7513 permits discipline for off-duty conduct "only" in those instances where discipline is for "such cause as will promote the efficiency of the service." The adverb "only" is rendered meaningless if mere displeasure of agency officials and/or the unsubstantiated and illogical speculations of future repercussions is substantial evidence justifying removal. Certiorari must be granted so that the proper limits on agency disciplinary authority may be addressed.

2. The Opinion and Order Below Are Wrongly Decided

Although the MSPB majority based a nexus finding in this case on separate theories of "mission impairment" and of a management loss of "trust or confidence" (App. 42a-43a), the Federal Circuit functionally upheld the MSPB decision on a "trust or confidence" basis stated in the guise of a "mission" theory. Thus, in the pivotal language of the Federal Circuit opinion, the court of appeals first stated that substantial evidence supports a nexus finding between the alleged conduct

and "both the mission of the agency in general and his job responsibilities in particular." App. 7a. However, in elaborating on the basis for the conclusion, the Federal Circuit asserted that "the *trust and confidence* of the Marine families and the Marine commanders served by MWR was essential to MWR's proper functioning and to Mr. Brown's performance of his duties within MWR" and that "the necessary *trust and confidence* was undermined by conduct of the sort at issue in this case." *Id.* (emphasis added). As will be explained *infra*, the only circumstances in which a "mission impairment" theory may justify a nexus conclusion are clearly inapposite to the present case, and the "trust and confidence" theory actually applied by the Federal Circuit for a nexus finding is an impermissibly open-ended invitation for agency officials to remove an employee for mere displeasure with the employee's off-duty activity.

For a nexus to be found based on "mission impairment" grounds, the off-duty conduct of the disciplined employee must be so closely connected to the employee's job responsibilities that the *integrity of any future job performance of that employee is impugned by the off-duty conduct that has occurred*! Ironically, the four court cases cited in the Federal Circuit's decision demonstrate that a nexus finding based on "mission impairment" is closely cropped and not intended to extend to purported losses of trust and confidence.

In *Giles*, *supra*, an Internal Revenue Service agent responsible for the collection of delinquent tax payments and returns was removed after he failed to timely file his own returns. 553 F.2d at 648. In upholding the removal, the court rhetorically asked "how must it appear to plaintiff's fellow workers, to revenue officials of the state, and to other members of the taxpaying public who know of it, that an agent of IRS evaded compliance with so elementary, but fundamental, a requirement of the income tax system." 553 F.2d at 650. Later, the court reiterated that "[m]embers of the public, who must

turn square corners in tax matters, demand no less of revenue officers." *Id., quoting from Birnholz v. United States*, 199 Ct. Cl. 532, 537 (1972).

Masino, supra, involved a customs inspector required to enforce laws against marijuana who was removed for his off-duty personal use and transportation of marijuana. 589 F.2d at 1049. The court noted (589 F.2d at 1056):

> Since possession and/or use of marijuana is a violation of federal criminal statutes, he was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties. . . . [T]he transportation and use of the very contraband which a law enforcement officer is sworn to interdict, is clearly misconduct which "speaks for itself."

In *Allred, supra*, an employee removed for the off-duty molestation of a child (786 F.2d at 1129) was responsible for the monitoring of health and social service programs for children. 786 F.2d at 1131. The Federal Circuit concluded that a nexus could be found on a "mission impairment" basis, and that proof of a direct effect on the employee's job performance was unnecessary only because the "misconduct was of a character likely to undermine *public* confidence in the agency." *Id.* (emphasis added). Thus, it was only because the public could legitimately question the integrity of services provided by the employee that a nexus finding in the absence of proof of an effect on job performance was justified in *Allred*.

Yet perhaps the most illustrative decision on the limitation of a nexus finding based on an "mission impairment" theory is found in the Seventh Circuit's decision in *Wild v. United States Department of Housing and Urban Development*, 692 F.2d 1129 (7th Cir. 1982). In particular, *Wild* explains the scope of the nexus requirement under Section 7513 in light of the "prohibited personnel practice" prohibition found in 5 U.S.C. 2302(b)(10). Under Section 2302(b)(10), a federal official with disciplinary authority over employees may not "discriminate . . .

against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." *Wild* concerned a housing appraiser with the Department of Housing and Urban Development (692 F.2d at 1130) who was also an off-duty "slumlord" (692 F.2d at 1133). The Seventh Circuit in *Wild* recognized that, in light of Section 2302(b)(10), the nexus requirement in Section 7513 disallows the taking of disciplinary actions against persons who are engaged in "deviant or unorthodox private behavior" unless it is a disciplinary action in "the interests of the agency." 692 F.2d at 1133. Removal of the employee in *Wild* was still proper under the nexus requirement because more was present; *i.e.*, "a HUD appraiser moonlighting as a 'slumlord.'" *Id.* It was this "behavior [which was] blatantly inconsistent with the mission of the employer." *Id. Wild* thus carefully draws the distinction between arguably distasteful off-duty activities of an employee (that are immune from the disciplinary authority of the federal employer) and the limited circumstances in which off-duty conduct may warrant discipline under the nexus requirement on a "mission impairment" theory.

Nexus was thus found in each of these cases because the integrity of any job performance by the employee could be impugned by the employee's off-duty activities. By contrast, Mr. Brown served as an area program manager for the MWR Department at a Marine base, and was thus responsible for the planning, development and coordination of social events for military personnel. App. 2a, 16a-17a. In other words, Mr. Brown was a "party and recreation event planner," and not a "counselor or therapist." App. 16a-17a. The point is that the integrity of any recreational and social events for Marines and their families planned and facilitated by Mr. Brown cannot be impugned merely by the events attributed to Mr. Brown in his private life. As such a finding cannot be made regarding the social event planning by Mr. Brown, the Federal Circuit erred in upholding a finding of nexus based on a premise of the conduct being contrary to the agency mission.

By upholding the removal decision based upon a management loss of "trust or confidence," the Federal Circuit has created a dangerous blueprint for unwarranted governmental inquiries into employees' private lives. The MSPB itself has stated that "the establishment of nexus . . . should not depend upon mere assertion or speculation." *Merritt v. Department of Justice*, 6 MSPB 493, 510, 6 M.S.P.R. 585, 606 (1981); *see also Bonet v. United States Postal Service*, 661 F.2d 1071, 1076 (5th Cir. 1981) (an "agency cannot satisfy the statutory requirement that an employee's removal promotes the efficiency of the service by use of unsupported, general assertions that such action is necessary to maintain the public confidence"); *D.E. v. Department of the Navy*, 721 F.2d 1165, 1169 (9th Cir. 1983) (statements by employee's superiors to the effect that the superiors lost confidence in the employee found to be inadequate evidence of nexus). Yet all of the evidence presented by the agency below to "justify" a nexus finding based on a purported loss of trust and confidence was premised on the speculative predictions of how persons would react to Mr. Brown's presence if he remained on the job. *See* App. 4a-7a, 17a-18a (describing agency testimony before MSPB on purported loss of trust or confidence by agency with liberal assertions of what "would" happen). Speculations by agency officials of how Mr. Brown's future presence will be perceived is not substantial evidence of nexus.

What *may* have justified a nexus finding, on this record, due to a purported loss of trust and confidence was, as noted in Judge Linn's dissenting opinion, completely absent in this case. A nexus finding must be based on a connection between the off-duty conduct and "the employee's job-related responsibilities." *Allred, supra*, 786 F.2d at 1130. Yet, as noted in the dissenting opinion below (and not contradicted by the majority opinion), no agency witness on the nexus question testified as to any impairment of future job performance by Mr. Brown because of his off-duty conduct. App. 10a-11a, 15a. Nor was there any evidence from Marines and/or their family members

outside of authority positions that they would be reluctant to use Mr. Brown's services because of the off-duty conduct that is attributed to Mr. Brown. App. 10a, 18a-19a, 32a.

The misapplication of the "loss of trust or confidence" theory of nexus in this case is, however, indicative of what is the *true* reason for the agency's removal of Mr. Brown from his civilian position. Mr. Brown was removed simply because agency officials personally disapproved of Mr. Brown's purported conduct. As the dissenting opinion cogently stated (App. 18a):

> Brown's superiors, including his immediate boss and two Marine colonels, essentially testified that they disapproved of Brown's behavior. If this evidence is enough to warrant removal, then no employee is safe from the threat of removal.

Similarly, the Federal Circuit's continued suggestion that the decision to remove Mr. Brown is justified by the "mores" of the "Marine community" (App. 11a, 13a) is indicative of the fact that nexus was ultimately found based on the personal perspectives of Mr. Brown's Marine superiors. However, personal disagreement with how a *civilian* employee chooses to conduct his off-duty affairs is not a proper basis for a nexus finding. Judge Linn's dissenting opinion is correct in its suggestion that removal cannot be sanctioned "because of a difference in values between that employee and his superiors." App. 18a. Or, as stated in MSPB Vice Chair Slavet's dissenting opinion below, "[Mr. Brown] in his civilian capacity is not a Marine and accordingly, is not subject to Marine Corps standards." App. 32a.

Despite the specialized jurisdiction of the Federal Circuit, this Court has previously found it appropriate to review Federal Circuit decisions because of the importance of the underlying question of federal law.[1] *E.g.*, *Gregory v. United States Postal*

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[1] Except where issues of unlawful discrimination under one or more specified statutes are also present, the Federal Circuit has exclusive jurisdiction to review MSPB decisions. 5 U.S.C. 7703(b)(1) and (2).

Service, 212 F.3d 1296 (Fed. Cir. 2000), *cert. granted sub. nom., United States Postal Service v. Gregory*, No. 00-758 (U.S. Feb. 20, 2001). This case presents an important question of federal law appropriate for this Court's review. Section 7513(a) authorizes removals of civilian employees "only" for such cause as will promote the efficiency of the service. If employees could be removed simply because of the personal displeasure of superiors toward the lawful off-duty activities of civilian employees, there would be functionally no limitation on federal employment discipline since the raison d'etre of any employment discipline is the employer's displeasure with the subject conduct. To the contrary, lawful and private off-duty conduct by any civilian employee that does not impair the agency's operations *is simply none of the employer's business*!

There is no evidence that Mr. Brown's present or future job performance is hampered because of the purported off-duty conduct. Mr. Brown's removal cannot be based on speculative assertions of a loss of trust or confidence, and the Federal Circuit's labeling of a purported loss of trust or confidence under a "mission interference" theory is a misapplication of the nexus requirement. The Federal Circuit's decision is clearly erroneous, and certiorari should be granted.

B. The Federal Circuit's Application of the Nexus Requirement Conflicts With the Standards Established By Other Federal Appellate Courts For The Application Of The Nexus Requirement

A further basis for this Court's granting of the present petition for certiorari may be seen in the conflict between the application of the nexus requirement by the Federal Circuit in this case and the standards established for the application of the nexus requirement by other federal appellate courts. In the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Sec. 144, 96 Stat. 25, 45 (1982), the provision governing judicial review of MSPB decisions, 5 U.S.C. 7703(b), was amended to provide that the Federal Circuit is the exclusive

forum to review MSPB decisions except where, per 5 U.S.C. 7703(b)(2), the case involves claims of unlawful discrimination under any of a number of civil rights statutes. Thus, a majority of MSPB decisions subjected to judicial review are presently decided by the Federal Circuit. However, other circuits still currently address MSPB decisions on issues of federal employment law in the course of also resolving claims of unlawful discrimination. *See e.g., Williams v. Department of the Army*, 715 F.2d 1485, 1489-91 (Fed. Cir. 1983) (*en banc*); *Barnes v. Small*, 840 F.2d 972, 979 (D.C.Cir. 1988); *Morales v. MSPB*, 932 F.2d 800, 801-02 (9th Cir. 1991) (all indicating that, per 5 U.S.C. 7703(b)(2), a district court has jurisdiction to review nondiscrimination issues decided by the MSPB where discrimination issues are also present).

The existence of statutory language forbidding the federal employer from removing civilian employees except for "such cause as will promote the efficiency of the service" long predates the statute placing primary judicial review authority over MSPB decisions with the Federal Circuit.[2] As a result, federal appellate courts other than the Federal Circuit have addressed the nexus requirement currently found in Section 7513, and these other appellate courts may again address the nexus requirement in the future. The standards applied by other federal appellate courts for the nexus requirement are directly contradicted by the Federal Circuit's decision in this case. The conflict between the present Federal Circuit decision and the application of the nexus requirement by other federal appellate courts is an additional basis for the granting of certiorari.

The Federal Circuit's decision in the present case upheld a nexus finding on the basis of the bald assertions by agency officials that *they* have lost trust and confidence in Mr. Brown's

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[2] The statutory language limiting an employing agency's removal authority to "such cause as will promote the efficiency of the service" has its origins in the Lloyd-La Follette Act of 1912. *Arnett v. Kennedy*, 416 U.S. 134, 150 (1974) (Rehnquist, J., plurality opinion).

job performance because of his alleged conduct. Yet the type of testimony on officials' trust and confidence found sufficient for nexus purposes by the Federal Circuit has been found to be inadequate by both the Fifth and Ninth Circuits. *See Bonet, supra*, 661 F.2d at 1076 (Fifth Circuit holding that an "agency cannot satisfy the statutory requirement that an employee's removal promotes the efficiency of the service by use of unsupported, general assertions that such action is necessary to maintain the public confidence"); *D.E., supra*, 721 F.2d at 1169 (Ninth Circuit holding that statements by employee's superiors to the effect that the superiors lost confidence in the employee found to be inadequate evidence of nexus). More generally, numerous federal appellate courts other than the Federal Circuit have read the nexus requirement to require the overturning of agency removal decisions where no evidence of an adverse impact on job performance is shown as a result of an employee's off-duty conduct. *E.g., Gloster, supra*, 720 F.2d at 704 (D.C. Circuit overturned agency decision to remove custodial employee for welfare fraud where no relation shown between off-duty conduct and job performance); *D.E., supra*, 721 F.2d at 1169 (Ninth Circuit overturned removal of diesel engine mechanic for child molestation where "not a scintilla of evidence" was presented showing that the off-duty conduct affected the employee's work); *Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978) (Fourth Circuit overturned removal of employee for off-duty altercation with co-worker due to absence of a showing of impact on employee's job); *Young v. Hampton*, 568 F.2d 1253, 1258 (7th Cir. 1977) (removal of Department of the Army employee for off-duty possession of marijuana and other illegal drugs overturned by Seventh Circuit in the absence of evidence of adverse effect on the efficiency of the service).[3]

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[3] *See also DeLeonardis v. Weiseman*, 986 F.2d 725, 727 n. 9 (5th Cir), *cert. den.*, 510 U.S. 817 (1993) (Fifth Circuit observation that the Office of Special Counsel misapplied the nexus principles embodied in 5 U.S.C. 2302(b)(10) by investigating an employee's off-duty lifestyle and activities).

Collectively, the appellate court decisions just described recognize the basic principle that, regardless of the nature of the employee's off-duty conduct, a nexus to the employee's job performance must be shown for the federal employer to cite that off-duty conduct in a disciplinary setting. As the Fourth Circuit stated in *Phillips*, *supra*, "the mere fact that the employee has committed an immoral or disgraceful act- even a criminal act- will not justify a discharge." 586 F.2d a 1011. Similarly, the Seventh Circuit in *Wild*, *supra*, in explaining the scope of the nexus requirement in light of the Section 2302(b)(10) prohibition on discipline for conduct which does not affect the employee's performance or the performance of others, distinguished those off-duty actions actionable under the nexus requirement from "deviant or unorthodox private behavior" which does not, standing alone, warrant federal employer discipline. 692 F.2d at 1133.

In contrast to the principles developed in these other appellate courts, the Federal Circuit upheld Mr. Brown's removal based on expressions of a loss of management trust and confidence unaccompanied by any evidence of an adverse impact on either the job performance of Mr. Brown or the job performance of others. Distilled to their essence, the claims of lost "trust and confidence" are nothing more than the expressions of personal displeasure by management officials. Under the decisions of federal appellate courts other than the Federal Circuit, such evidence would be deemed insufficient to meet the nexus requirement. The Federal Circuit's application of the nexus requirement in a manner conflicting with the decisions of other federal appellate courts is an additional basis for the granting of certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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